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May 20, 1996

BY HAND

William F. Caton
Acting Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

CC Docket No. 96-98
Comments of Virginia Power

Dear Mr. Caton:

Transmitted herewith on behalf of Virginia Power are an original and twelve copies of comments in the above-referenced proceeding.

If you have any questions concerning this filing, please call me.

Very truly yours,

Charles H. Carrathers, III

Enclosure

No. of Copies rec'd 0+12

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	

COMMENTS OF VIRGINIA ELECTRIC AND POWER COMPANY

Virginia Electric and Power Company (Virginia Power) respectfully submits the following Comments in response to the Notice of Proposed Rulemaking (NOPR) issued by the Federal Communications Commission in this docket on April 19, 1996.

Statement of Interest

Virginia Power is an investor-owned electric utility engaged in the generation, transmission, distribution, and sale of electric energy to almost two million customers throughout most of Virginia and portions of North Carolina. The facilities owned by Virginia Power include approximately one million distribution poles and thousands of miles of conduits, ducts and rights-of-way. To the extent these facilities are used in whole or in part for wire communications, Virginia Power is subject to regulation by the FCC under the federal Pole Attachment Act (PAA), 47 U.S.C. § 224, as amended by the Telecommunications Act of 1996.[1] Accordingly, Virginia Power has a vital interest in the PAA and the rules promulgated by the Commission.

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[1] To date, neither Virginia nor North Carolina regulate pole attachments; therefore, Virginia Power currently is subject to federal regulation under the PAA.

Background

On April 19, 1996, the Federal Communications Commission ("Commission") issued its NOPR in the above docket. The primary focus of this NOPR is on the obligations placed upon incumbent local exchange carriers ("LECs") under the Telecommunications Act of 1996. For the most part, therefore, the rulemaking does not directly affect the interests of electric utility companies such as Virginia Power. In one regard, however, the rulemaking may have a significant impact on electric companies -- the interpretation and implementation of the PAA.[2]

The PAA directs the Commission to regulate the rates, terms and conditions under which cable television systems and telecommunications carriers may attach their facilities to the poles, ducts, conduits or rights-of-way of LECs and electric utilities. Although the instant rulemaking focuses on LECs, it implicates portions of the PAA that apply to both LECs ***and*** electric companies.

In these Comments, Virginia Power will discuss the special issues related to attachments to electric utility poles[3] and the potential harm that could arise if those issues are not adequately addressed in the implementation of the amended PAA. Although the PAA applies to both electric utilities and LECs, there are significant differences between these two groups of pole owners. Indeed, Congress recognized that attachments to electric poles raise particular concerns and therefore explicitly provided that electric utilities may refuse to

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[2] The amendments to the PAA are discussed in Section II(C)(4) of the NOPR.

[3] For purposes of these Comments, the term "pole" shall mean the "poles, ducts, conduits and rights-of-way" covered by the PAA.

permit access to their poles if there is "insufficient capacity" of for "reasons of safety, reliability and generally applicable engineering purposes." 47 U.S.C. § 224(f)(2). Virginia Power and other electric utilities design, construct and maintain their poles to fulfill their public service obligation to provide reliable electric service. Use of those facilities by third parties for telecommunication purposes is merely incidental and should not be permitted to interfere with the primary purpose of providing safe and reliable electric service.

Furthermore, the Commission should consider the interests of electric utility ***customers*** in promulgating its pole attachment rules Electric utility poles are constructed for the benefit of and are paid for primarily by the utility's native load customers. Even though certain aspects of the electric industry may become more competitive, there is almost universal agreement that the transmission and distribution functions will continue to be natural monopolies. Consequently, electric consumers will not be able to by-pass or avoid the costs associated with distribution facilities, which include the poles, ducts, conduits and rights-of-way covered by the PAA. To the extent that the Commission shifts costs from attaching entities to pole owners, or imposes requirements that make the distribution function of electric utilities more burdensome, these additional costs and burdens ultimately will be borne by electric consumers.

Virginia Power recognizes that the expansion of competitive telecommunications markets is an important and desirable policy goal But the safe, reliable and cost-effective provision of electric service is an equally important goal that cannot be ignored.

Comments

1. Mandatory Access to Utility Poles

With regard to access to utility poles, the PAA provides, in pertinent part:

> 1. A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.
>
> 2. Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.

47 U.S.C. § 224(f).

In the NOPR, the Commission states that the PAA now "requires [utilities] to provide access to poles, ducts, conduits and rights-of-way . . ." NOPR ¶ 220, at 76.[4] Such a mandatory access requirement poses serious constitutional questions. The previous version of the PAA was challenged as an unconstitutional taking of property in violation of the Fifth Amendment. The Supreme Court rejected the constitutional challenge, but in doing so relied heavily upon the fact that the PAA did not require pole owners to permit attachments. See FCC v. Florida Power Corp., 480 U.S. 245, 250-53 (1987). Virginia Power believes that any mandatory access requirement would result in a taking of private property, and notes the potential constitutional issue to make clear that in providing these Comments it does not concede the constitutionality of such a requirement

2. Meaning of Non-Discriminatory Access

In paragraph 222 of the NOPR, the Commission requests comments on the meaning

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[4] The Commission noted that access was *not* required under the earlier version of the PAA. Id.

of "nondiscriminatory access" with respect to § 224(f)(1) of the PAA. The phrase "nondiscriminatory" has a long history of usage in the context of regulated services. Whether related to rates or conditions of service, "nondiscriminatory" has become a term of art that means treating similarly situated persons in a similar manner. See generally Henry H. Perritt, Jr., Law and the Information Superhighway § 2.8 (1996) (discussing the history of the "nondiscrimination" principle of utility regulation). Thus, nondiscriminatory treatment does not guarantee equality of results, but merely requires the consistent application of principles and guidelines. This concept is particularly important for present purposes because of the many variables that affect each pole attachment.

The type and size of the pole, the type and size of the attachment, the condition of the pole, the location of the pole, the type and use of the area surrounding the pole and the type, location and number of attachments already on the pole are just some of the factors that must be considered. Moreover, the pole owner must consider those factors in light of the extensive and complex engineering policies and guidelines that apply to pole attachments. The process is further complicated by the fact that these policies and guidelines must be applied on the basis of engineering judgement and experience, because in many situations there are no "clear cut" answers.[5]

Given the varied nature of pole attachments, Virginia Power submits that "nondiscriminatory access" cannot be defined more precisely than the provision of access based on principles and policies that are applied to telecommunications carriers and cable

[5] The complexity and difficulty of determining whether to permit attachments and how such attachments should be made are discussed more fully in Virginia Power's comments regarding safety, reliability and engineering issues.

television systems on a consistent and fair basis. Any attempt to define the concept with greater specificity would be ineffective, because no single definition can adequately encompass the variety of circumstances in which pole attachment requests arise.

3. Access Afforded to Affiliates of Pole Owner

In paragraph 222 of the NOPR, the Commission requests comments on the type of access rules that should apply to affiliates of the pole owner. Virginia Power believes that if an electric utility has an affiliate that is a telecommunications carrier or cable television system, that affiliate should be treated in the same manner as any other similar entity.

Nevertheless, there are legitimate grounds for distinguishing an electric utility's use of its own poles from the use made by telecommunications carriers and cable television systems. The Commission should not ignore the fact that the poles, ducts, conduits and rights-of-way are designed and intended for a particular purpose -- to provide for the distribution of electricity to the utility's native load customers. Attachments used to support third-party telecommunications activities are a secondary use of these electric facilities.

4. Utilities' Reserve Space

Electric utilities rely on their local distribution facilities to meet the present and ***future*** power needs of their customers, who ultimately bear the costs associated with these facilities. It follows that the use of these facilities to serve the electric customers on whose behalf they were installed should have absolute priority over any use by third parties. The Commission's rules should recognize the fundamental distinction between an electric utility's use of its own facilities to fulfill its public service obligations and the incidental use of those facilities by private telecommunications and cable companies. Accordingly, Virginia Power submits that electric utilities should retain the absolute right to reserve for their own use all the space required to ensure that utilities can meet their customers' present and future needs.

The right to reserve space is particularly important in light of the changes to the PAA. Previously, pole owners were not required to permit attachments. Electric utilities, therefore, had enough control over their own facilities to ensure that pole attachments did not interfere with their primary service obligation. But as discussed above, the Commission has indicated that the revised PAA now mandates access to poles. Putting aside the constitutional questions raised by the PAA, mandatory access to poles for third parties will diminish the ability of electric utilities to serve their customers unless the utilities can reserve adequate pole space for their present and future needs.

Although the amended PAA permits electric utilities to deny access for attachments that might have an adverse impact on safety or reliability,[6] the right to reject a specific

[6] See 47 U.S.C. § 224(f)(2).

attachment is not sufficient to protect the interests of electric consumers. Electric utilities must retain their right to exclude all third-party attachments from portions of their poles to ensure that the utilities can meet their public service obligations. Virginia Power is required by law to plan for future load growth in its service territory. An integral part of that planning process is the need to design a distribution system, including poles, ducts, conduits and rights-of-way, that can accommodate increases in load and the number of customers. Thus, Virginia Power and all other electric utilities must have sufficient reserve space to accommodate the future needs of its consumers.

Without the right to reserve space, electric utilities may find that pole space intended to meet the needs of electric customers has been taken by third parties to further their own private enterprises, resulting in increased costs of supplying electric service. Put another way, electric consumers would be forced to bear the costs of expanding pole space to accommodate the needs of private enterprises. Congress did not intend such an illogical result.

Based upon the foregoing, Virginia Power proposes that the Commission not interfere with the electric utilities' right to designate reserve space in their poles, ducts, conduits, and rights-of-way.[7] This practice protects the legitimate interests of electric consumers while furthering the goal of permitting nondiscriminatory access to electric utility poles for telecommunications carriers and cable television systems. Furthermore, as explained in the

[7] In essence, the Commission should preserve the current practices under which electric utilities reserve space. Although some utilities allow third parties to attach in this reserve space, these third parties are required to replace or rearrange their attachments when the reserve space is needed by the utility.

following section, allowing electric utilities to reserve pole space is consistent with the statutory right of electric utilities under § 224(f)(2) to refuse to permit attachments based on the insufficiency of existing pole capacity.

5. The Meaning of "Insufficient Capacity"

Section 224(f)(2) of the PAA states that a utility providing electric service may refuse to allow a pole attachment if there is "insufficient capacity." In paragraph 223 of the NOPR, the Commission requests comments on the meaning of insufficient capacity.

In § 224(f)(2), insufficiency of capacity is listed as an ***independent*** reason for denying access for an attachment, separate and apart from specific safety, reliability and engineering concerns. Therefore, Congress must have intended that electric utilities should have the right to restrict access to their poles for reasons beyond immediate safety and reliability concerns. Viewed in this light, the only reasonable interpretation of the electric utilities' right to refuse attachments based on the "sufficiency" of existing capacity is that Congress was seeking to accommodate the particular responsibilities of electric utilities -- the sole source of electric distribution for native load customers -- to meet their customers' present and future needs.

Even apart from safety and reliability concerns, there is a need to ensure that electric consumers receive the benefits to which they are entitled from facilities that have been installed to serve them. This can be achieved only if electric utilities are permitted to deny access for attachments that would encroach on pole space needed to support electric supply services. The concept of "insufficient capacity," as used in § 224(f)(2), therefore should be interpreted as encompassing the right of an electric utility to refuse an attachment if it would interfere with the utility's performance of its public service obligation. That Congress

specifically recognized the need of electric utilities (as distinguished from other pole owners) to retain control over access to their distribution facilities provides statutory support for Virginia Power's proposal that electric utilities retain their right to reserve space on their poles, ducts, conduits and rights-of-way.

6. Denying Access for Reasons of Safety, Reliability or Engineering Purposes

In addition to denying access due to insufficient capacity, § 224(f)(2) permits an electric utility to deny access "for reasons of safety, reliability and generally applicable engineering purposes." In paragraph 223 of the NOPR, the Commission requests comments on (i) the specific conditions under which access could be denied for those reasons and (ii) whether the Commission should adopt "regulations that require a certain minimum or quantifiable threat to reliability before a utility may deny access under § 224(f)(2)."

a. *Safety and Reliability Concerns are Paramount*

Congress specifically provided that electric utilities be allowed to maintain control of their facilities in order to ensure safe and reliable electric service to the public. The importance of that principle cannot be overemphasized Interruptions in electric service are not merely annoyances; they can have severe economic and safety consequences. In many circumstances, the inability to provide continuous electric service can be life threatening. Moreover, the primary purpose of utility pole attachments is to distribute high voltage electric current, which can be hazardous in and of itself if proper attention is not paid to safety and engineering matters. As the Virginia Supreme Court has noted, "those engaged in the distribution of electrical energy must use a high degree of care in order to prevent injury to others." Kelly v. Virginia Electric and Power Co., 381 S.E.2d 219, 223 (Va. 1989)

(citing Smith v. Virginia Electric and Power Co., 129 S.E.2d 655, 659 (Va. 1963)).

Electric utilities are primarily responsible for providing safe and reliable electric service. That obligation is vital to the public interest and welfare and should not be subjugated to the interests of telecommunications entrepreneurs.

b. *Impossibility of Specifying a "Minimum or Quantifiable" Threat*

The safety and reliability of electric service are complex issues that are very fact-dependent. Accordingly, Virginia Power believes it is impossible to articulate a complete list of the "conditions under which access could be denied" for safety, reliability or engineering reasons. Similarly, the suggestion that a "quantifiable" threat to safety or reliability be established as a standard for denying access to a pole fails to account for the degree of engineering judgement that must be applied to each individual situation. If attachments are refused only in cases in which there is a palpable hazard, the safety and reliability of electric service will be degraded significantly.

The primary source for engineering standards and guidelines applicable to electrical distribution and telecommunications facilities is the National Electrical Safety Code ("NESC"). The NESC contains hundreds of specific rule and guidelines that are intended to provide the "basic provisions that are considered necessary for the safety of employees and the public under specified conditions." NESC Art. 010. Such minimum safety standards are not always sufficient to prevent safety hazards, as the NESC recognizes when it states that for "all particulars not specified in these rules, construction and maintenance should be done in accordance with accepted good practice for the local conditions." NESC Art. 012.C.

But even though pole owners generally follow and apply the guidelines of the NESC,

almost all pole owners apply their independent engineering expertise and understanding of local conditions to develop specific safety standards, some of which go beyond the requirements of the NESC.[8] In fact, this Commission has had the opportunity to consider Virginia Power guying requirements that exceeded the then-current NESC requirements and the standards applied by the telephone industry. See Newport News Cablevision, Ltd. v. Virginia Electric and Power Company, Case No. DA 92-500 (April 16, 1992). Based on the evidence presented in that case, the Commission found Virginia Power's requirements to be reasonable. Thus, although the NESC provides basic guidance for the industry it does not cover all circumstances, and most utilities must establish specific safety standards and rules to reflect and accommodate their specific conditions and experiences.

The NESC and utility-specific standards are not the only guidelines that need to be considered. The National Electric Code, which is used primarily by the construction industry, applies in certain situations in which lines are connected to or near buildings. In addition, there are often specific requirements imposed by state or local governments that must be considered. For example, the Virginia Department of Highways and Transportation and the North Carolina Department of Transportation each have different ground clearance requirements for overhead lines crossing interstate highways or secondary roads. Other legal requirements, such as those imposed by the Occupational Safety and Health Act, also must

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[8] In some cases, the need to go beyond the provisions of the NESC are necessary to satisfy the utilities' legal standard of care. For example, the trial court in Kelly specifically noted that compliance with the NESC was not dispositive and that Virginia Power could rely on such compliance only "in the absence of evidence that it knew or had reason to know that people would come into contact with [its lines], notwithstanding compliance with the [NESC]." Kelly v. VEPCO, Case No. LK-924-3, slip op. at p.2 (Circuit Court of the City of Richmond, May 19, 1987) (attached as Attachment A).

be taken into consideration.

Thus, the safety issues associated with attachments to electric utility poles are myriad and cannot be adequately addressed without extensive engineering expertise. Overlaying all of the complexity of these issues is the fact that the pole owners are ultimately responsible for making their facilities as safe as reasonably possible. A pole owner must be accorded sufficient latitude to develop adequate safety standards for itself and third-party attachers to meet local conditions and needs. Virginia Power, therefore, strongly urges the Commission not to attempt to develop standardized regulations to determine when an attachment presents a safety or reliability concern or violates general engineering principles. Indeed, even the NESC, which is as close to an authoritative source on these issues as currently exists, does not purport to be all-inclusive or definitive on all points.

Furthermore, the administrative burden on the Commission to undertake the detailed oversight of the implementation of safety and engineering issues for pole attachments would be immense, particularly given that this is an area in which the Commission and its staff have relatively little experience. The stakes associated with the maintenance of safe and reliable electric service are too high to permit that sort of regulatory experimentation. Virginia Power, therefore, respectfully suggests that the Commission should not attempt to craft regulations specifying the conditions under which an attachment could be rejected for safety, reliability or engineering reasons. Similarly, the Commission should decline to require a measurable or quantifiable threat before an attachment could be refused.

Finally, Virginia Power believes that any rule that places limits on a utility's assessment of safety and reliability would be contrary to Congressional intent and would

undermine the important public interests Congress sought to protect. If, however, the Commission believes it is necessary to adopt a rule governing the assessment of safety, reliability and engineering concerns, Virginia Power believes this rule should be flexible enough to address the specific needs of a given utility for a specific attachment. Accordingly, Virginia Power proposes that utilities be permitted to reject an attachment pursuant to any "Prudent Pole Attachment Practice," which would be defined as:

> Any practice, policy, standard, method or act that, in the exercise of reasonable judgement in light to the facts known at the time a decision is made, would be expected to accomplish the goals of safety, reliability and sound engineering practice in a reasonable manner. Prudent Pole Attachment Practice includes, but is not limited to, any practice, policy, standard, method or act accepted by a significant portion of the electric industry or necessary to comply with any applicable federal, state or local statute or regulation. Prudent Pole Attachment Practices should be consistent with the applicable provisions of the National Electric Code and the National Electrical Safety Code, but may exceed these requirements. Prudent Pole Attachment Practices are not limited to the optimum practices, policies, standards, methods or acts to the exclusion of others.

Virginia Power believes that this flexible standard, coupled with the requirement that such Prudent Pole Attachment Practices be applied in a nondiscriminatory basis, properly balances the interests of all the affected parties.

7. Burden of Proof Where Access is Denied

In paragraph 223 of the NOPR, the Commission asked whether it should establish a rule expressly imposing "on utilities the burden of proving that they are justified un denying access pursuant to [S]ection 224(f)(2)." Virginia Power believes that the Commission's current rules, which impose the burden of establishing a prima facie case on the complainant, are appropriate and should be retained here. See 47 C.F.R. §1.1409(b). Similarly, if the

complainant fails to support its allegations with specific data and information, the complaint is subject to dismissal. See 47 C.F.R. § 1.1404 (f) and (g); 47 C.F.R. § 1.1406. There is no reason for the Commission to depart from these well-accepted rules.

Moreover, it would be particularly poor policy to relieve complainants of the burden of proof in disputes concerning the safety and integrity of electric systems. Such a rule would send the message that the private interests of a prospective attacher supersede the public's interest in safe and reliable electric service. Virginia Power believes that in every case where such a choice must be made, the interests of a single entrepreneur must give way to public safety and welfare. Accordingly, the ultimate burden of persuasion should be on the third party to prove that his interests will not impinge on the public's, not the other way around.

In addition, shifting the burden of proof to electric utilities could have an adverse effect on the safety and reliability of electric service. Often there are not "clear cut" answers to the safety and reliability issues raised by pole attachments. In such circumstances, a utility faced with a litigious attaching entity might be required to lower its safety or reliability standards. The best way to avoid this problem is for the Commission to adhere to its present policy of requiring the complainant to bring forward specific evidence demonstrating that the utility has acted without a reasonable basis or in a discriminatory fashion. Of course, that policy does not relieve a utility of the obligation to justify its action in a properly plead case. If the complainant establishes a prima facie case, then the burden of going forward with evidence to rebut the complainant's allegations shifts to the utility.

Finally, putting the burden of proof on utilities in cases involving safety and reliability would be inconsistent with the purpose of § 224(f)(2). By specifically emphasizing the need to preserve reliability and safety in electric service, Congress signaled its desire that the Commission not hamper the achievement of those goals. Reversing the traditional rules on burden of proof in cases arising under § 224(f)(2) cannot be squared with Congress' intent in enacting that statutory provision.

8. Allocation of Capacity

In paragraph 223 of the NOPR, the Commission asks whether it may or should establish regulations that require utilities to fairly and reasonably allocate capacity. Virginia Power submits that such regulations would be inappropriate. First, it is not clear that the PAA grants the FCC the authority to establish such regulations, at least where utilities allocate available capacity in a nondiscriminatory manner. Second, even if such regulations

were permissible, Virginia Power believes that any allocation methodology will vary depending on a number of circumstances, such as the type of facility being accessed and the number of parties desiring access. Accordingly, the Commission should not attempt to predefine all the circumstances under which one may "fairly and reasonably" allocate capacity.

9. Modifications and Alterations Under § 224(h)

As part of the amendments to the PAA, the Telecommunications Act establishes a new § 224(h) that addresses certain issues associated with modifications or alterations of poles, ducts, conduits and rights-of-way. Section 224(h) provides that when the owner intends to modify or alter its pole, conduit, duct or right-of-way, it must provide "written notice to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment." Section 224(h) further provides that if an entity takes advantage of such opportunity to add to or modify its attachment, the entity must "bear a proportionate of the costs incurred by the owner in making such pole, duct, conduit of right-of-way accessible."

Virginia Power believes that § 224(h) was intended to address access to ducts and conduits. Ordinarily, ducts and conduits are not readily accessible and obtaining access can be costly, time-consuming and disruptive of the surrounding property. This is particularly true with regard to ducts and conduits located in heavily developed areas. In light of these difficulties, Congress concluded that parties should make full use of the occasions when the conduits and ducts are made accessible when the utility must make an alteration or modification. Congress, therefore, required that attaching entities be apprised of these

opportunities so that they could take advantage of them. Congress also recognized, however, that the attaching entities were receiving value by avoiding the full cost of obtaining access for their own purposes. Rather than give the attaching entities a "free ride," Congress mandated that all entities taking advantage of the opportunity bear a proportionate share of the costs associated with making the pole, duct, conduit or right-of-way accessible.

a. *Manner and Timing of Notification*

In paragraph 225 of the NOPR, the Commission asked whether it may or should establish regulations regarding the manner and timing of the notice required by § 224(h). Virginia Power believes that the Commission's regulations should leave the manner and timing of such notice to the negotiation of the parties to be included in the applicable pole attachment agreement. Pole owners and attachers historically have been able to resolve these matters through good faith negotiations. Consequently, there is no need for Commission intervention in this area.

If, however, the Commission believes it must address these issues, Virginia Power proposes the following notification guidelines:

> 1. Pole owners should be required to give attaching entities thirty (30) business days prior notice of modification or alteration.
>
> 2. Attaching entities must provide a written notice to the pole owner indicating whether it will add to or modify its attachments within ten (10) days of the date of the pole owner's notice. The notice must specify the additions and modifications proposed by the attaching entity.
>
> 3. At least five (5) days before the pole owner begins its modification or alteration, the pole owner will respond to any entity providing notice in accordance with paragraph (2) above. In that response, the pole owner will indicate whether the

entity's proposed additions or modification can be accommodated and, if so, an estimate of the costs the entity would be required to bear as a result of the modification or addition.

4. At least one (1) business day prior to the commencement of the modification or alteration, all attaching entities still wishing to add to or modify their attachments in accordance with the notice provided pursuant to paragraph (2) above must confirm its intention to the pole owner in writing.

5. All costs incurred by the pole owner in preparing and providing the foregoing notices and responses shall be borne by the entities to which they are directed.

There are two other areas regarding notice under § 224(h) that should addressed by the Commission. First, the Commission should make clear that § 224(h) applies only to ***planned*** modifications or alterations by the owner. As a practical matter, the need for the pole owner and attaching entities to exchange information pertaining to the modifications precludes application of § 224(h) to any pole modifications that are not planned at least thirty (30) days in advance. More important, perhaps, § 224(h) should not be construed as limiting the right and ability of a pole owner to take immediate action to rectify any emergency situation that threatens safety or service reliability.

Second, the owner's obligation should be limited to providing notice to entities that have properly identified their attachments. Virginia Power's experience is that attaching entities often fail to provide adequate identification for their attachments, which makes it virtually impossible to identify the attaching entity The pole owner should not be responsible for the consequences of an attaching entity's failure to provide adequate identification.

b. *Determination of Proportionate Share of Costs*

In paragraph 225 of the NOPR, the Commission raises several questions regarding the obligation of attaching entities to bear a "proportionate share of the costs incurred by the owner in making the pole, duct, conduit or right-of-way accessible," and asks whether it should establish rules to determine the proportionate share of such costs. The Commission also asks whether the payment of such costs should be offset by the "potential increase in revenues to the owner as a result of the modification or alteration."

First and foremost, the payment of costs by attaching entities should not be offset by any potential additional pole revenues. In fact, any attempt to offset "potential" pole rental revenues is contrary to the other provisions of the PAA that establish pole attachment rates based on the number of attaching entities. Under the PAA, the rates paid by existing attachers decline when a new entity makes an attachment, because the total pole costs are allocated among more attachers. See 47 U.S.C. § 224(e). If the "potential" revenues associated with the "potential" new attachers are used to decrease the rates paid by existing attachers, then whenever these revenues ***actually*** materialize they will once again reduce the rates paid by the current attachers. In other words, these revenues will have been double counted. Congress did not intend such an illogical construction of the PAA. See, e.g., United States v. Preston, 739 F. Supp. 294 (W.D. Va. 1990) (In construing a statute, a court should strive to avoid illogical or senseless constructions) (citing United States v. Morton, 467 U.S. 822 (1984)).

c. *Limitations on Modifications and Additions*

In paragraph 225 of the NOPR, the Commission asks whether it should impose any limitations on an owner's right to modify a facility and then collect a proportionate share of

the costs of the modification. No such regulation is necessary, because an attaching entity cannot be required to pay a proportionate share of the costs covered by § 224(h) unless the attaching entity ***voluntarily agrees*** to make a modification. If an attaching entity believes that the costs of making such additions or modifications are excessive, it can choose not to incur them. The optional nature of § 224(h) thus precludes the need for specific regulation on this issue.

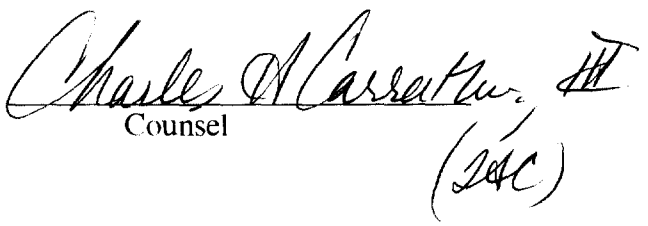
Conclusion

Virginia Power is vitally interested in the Commission's rules implementing the access provisions of the PAA, in large part because these rules will directly affect the safety and reliability of electric service. Virginia Power believes that the provision of safe and reliable electric service should take precedence over the private interests of third-party attachers, and that the Commission should carefully consider the interests of electric consumers in drafting any pole attachment rules.

WHEREFORE, Virginia Power respectfully requests that the Commission consider and adopt the proposals set forth in these Comments

Respectfully submitted,

VIRGINIA ELECTRIC & POWER COMPANY



Counsel

Date: May 20, 1996

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Circuit Court
OF THE
City of Richmond
John Marshall Courts Building

Attachment A

T. J. Markow
Judge

900 East Marshall Street
Richmond, Virginia 23219

May 19, 1987

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Gentlemen:

Re: Case No. Lk-924-3
Scott Kelly v. VEPCO

This is in response to defendant's motion to set aside the verdict and is the decision on the court's deferral of consideration on defendant's motion to strike the evidence made after plaintiff rested, after all evidence had been presented, and as an objection to giving any of the court's instructions.

The motions will be sustained for reasons given here and more fully elaborated on in defendant's Memorandum In Support Of Motion To Set Aside Verdict and Enter Up Judgment Notwithstanding The Verdict.

Plaintiff, a professional house painter, was badly injured when his 28'-29' aluminum extension ladder came in contact with a Virginia Power 19,900 volt line while he was attempting to move the ladder along the building he was painting. He had been working in the apartment complex for several days and had moved the ladder along this building several times on the day the accident occurred.

The power lines were roughly parallel to the apartment building, about 10.7'-11' (depending on how measured) from the building, and about 24' from the ground. At the point

of contact, the location of the line met the established national standards of the National Safety Electrical Code.

Plaintiff testified that he knew he could be seriously injured if his aluminum ladder came in contact with power lines and that if he knew these were uninsulated power lines, he would have used a fiberglass ladder for this project. He didn't choose to do so though, because of the configuration the lines (they were lined vertically rather than horizontally), their dark color, the existence of a clearly insulated line at the lowest level suggested to him that these lines were telephone lines. He testified, however, that he had never learned how to accurately distinguish power lines from telephone lines, nor did he make inquiry of anyone who could have accurately identified the lines. He testified that he knew he had to be careful to not touch even these lines, because he didn't want to break them. Therefore, he said he looked up to locate the lines before attempting each of his moves. He denied any tripping or stumbling during the move and could not remember what caused the contact with the wire.

There is no evidence on which the jury could have found Virginia Power to have breached its duty to the plaintiff. As one engaged in the production and distribution of electricity, Virginia Power's duty is to exercise a high degree of care commensurate with the danger involved to prevent injury to others. Robbins v. Old Dominion Power Co., 204 Va. 390 (1963). Trimyar v. Norfolk Tallow Co., 192 Va. 776 (1951).

Plaintiff claimed through his expert witness, Dr. Mazur, that Virginia Power should have insulated its line and should have located it farther away from the apartment building plaintiff was painting. However, at the point of contact with plaintiff's aluminum ladder, the location of an uninsulated 19.9 KV line was in compliance with the National Electrical Safety Code, the industry standard for locating such lines. Uncontradicted evidence was that the code distances from buildings and the ground took into account that persons lived in, and workers would work on, and around buildings. While compliance with the code is not in and of itself dispositive, Virginia Power was permitted to rely on its provisions in the absence of evidence that it knew